IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 18TH JUNE 2007 / 28TH JYAISHTA 1929

SA.No. 833 of 1993

AS.32/1989 OF SUB COURT, HOSDRUG
OS.77/1986 OF MUNSIFF COURT, HOSDRUG
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APPELLANT/RESPONDENT/PLAINTIFF:

K.SUSHEELA, D/O. ANNAKUNHI,
AGED 30 YRS, RESIDING AT MOOLAKANDAM,
AJANOOR VILLAGE, HOSDRUG TALUK.

BY ADV. SRI M GOPIKRISHNAN

RESPONDENTS/DEFENDANTS/APPELLANTS:
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1. **K.JANAKI, D/O. ANNAKUNHI,**
AGED 35 YRS, RESIDING AT NEELIYADUKKAM,
PANAYAL VILLAGE, HOSDRUG TALUK.

2. **BHASKARAN, S/O. BIRAN, AGED 37 YRS,**
RESIDING AT -DO- -DO-

BY ADV. SRI.S.VINOD BHAT
SRI.S.VINOD BHAT

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 833 OF 1993

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Dated this the 18th day of June, 2007

JUDGMENT

Plaintiff in O.S.77/1986 on the file of Munsiff Court, Hosdrug is the appellant. Respondents are the defendants. Plaint schedule property is 62 cents in R.S.137/1 of Uduma Village. Respondents contended that 72 cents including the plaint schedule property was obtained by her as per land assignment order in L.A.107/1973 and she never transferred the property and never intended to transfer the property also. It was contended that impersonating as the plaintiff, first respondent executed Ext.X1 sale deed (Ext.A1 being the registration copy) in favour of second respondent, her husband, and the said sale deed was created by the respondents in collusion with them and it is the result of impersonation, fraud and collusion and is not valid and binding on the appellant. Appellant also contended that on coming to know of

the impersonation, appellant filed a criminal complaint which was taken cognizance of by the police and respondents were tried by Judicial First Class Magistrate, Hosdrug in C.C.246/1984 and were found guilty and convicted for the offences under sections 416,468 and 477 read with section 34 I.P.C on 11.12.1986 and on the strength of the fradulent document respondents put up a thatched shed in the plaint schedule property and they have no right to do so. Appellant sought a decree for declaration that Ext.A1 sale deed was the result of impersonation and therefore not valid and binding on her or the property and was not executed by the appellant. She also sought a decree for mandatory injunction directing defendants to demolish the thatched house and to restore the plaint schedule property to its original position. Respondents in the written statement admitted that the appellant obtained the 72 cents including the plaint schedule property as per the order of Special Tahsildar(Land Assignment), Hosdrug as alleged in the plaint. But

it was contended that Ext.A1 sale deed was executed by the appellant after receiving consideration and is not the result of fraud, collusion, impersonation and it cannot be declared null and void. It was also contended that possession of the plaint schedule property was obtained by second respondent consequent to Ext.A1 sale deed and respondents are in possession of the property and even if appellant has any right, it is barred by adverse possession and therefore the suit is to be dismissed.

2. Learned Munsiff framed necessary issues. Apart from the appellant, the fingerprint expert who submitted a report on examining the thump impression seen in Ext.X1 sale deed with the admitted thump impression sent from court to the Forensic Science Laboratory was examined as PW2. Second respondent was examined as DW1 and two other witnesses were also examined as Dws. 2 and 3. Ext.A1, X1 and C1 to C2(b) were marked. Learned Munsiff on the evidence found that evidence of PW2

with Exts.C1 to C2(b) establish that the thump impression seen in Ext.X1 sale deed is not that of the appellant but the first respondent. Learned Munsiff also found that Ext.X1 records summoned from the Magistrate's Court establish that respondents were convicted and sentenced for the offences under section 416, 468 and 477 read with Section 34 of I.P.C for impersonating appellant and executing Ext.X1 sale deed. Learned Munsiff therefore granted a decree for declaration, recovery of possession and mandatory injunction. Defendants challenged the decree and judgment before the Sub Court, Hosdrug in A.S.32/1989. The learned Sub Judge on reappreciation of evidence holding that the suit was filed on the plea that Ext.X1 sale deed is vitiated by fraud and collusion and there was no proper pleading on the fraud and collusion in the plaint and therefore evidence of impersonation and judgment of the criminal court cannot be relied on, set aside the judgment passed by the trial court and dismissed the suit. It is

challenged in the Second Appeal.

3. The Second Appeal was admitted formulating the following substantial question of law.

Has not the first appellate court erred in dismissing the suit on the ground that details of fraud had not been specifically pleaded, when the suit was instituted alleging that Ext.X1 sale deed was created by first respondent impersonating appellant and therefore Ext.X1 sale deed is vitiated and not valid and binding on the appellant or the plaint schedule property?

4. Plaint schedule property admittedly originally belonged to the appellant. Second respondent is claiming title to the plaint schedule property under Ext.A1 sale deed. Ext.X1 is the original of Ext.A1 sale deed. Ext.X1 purported to be a sale deed executed by the appellant in favour of second respondent. The specific case pleaded in the plaint was that appellant did not execute the sale deed. It was also contended that Ext.X1 sale deed was executed by the respondents in

collusion and first respondent impersonated as appellant and executed the sale deed, as if appellant was executing the same in favour of her husband, second respondent. Unfortunately this aspect, which was correctly taken note of by the trial court, was misinterpreted and misunderstood by the first appellate court.

5. Though in the plaint there is an allegation that Ext.A1 sale deed was the result of fraud and collusion between the respondents, plaint does not contain any averment that the sale deed was executed by the appellant but was vitiated by fraud and collusion. On the other hand, the specific case pleaded was that the document was not executed by the appellant and instead it was executed by first respondent impersonating appellant, in favour of her husband. In such circumstance, first appellate court was not justified in holding that the suit is based only on fraud and collusion and as the details of fraud and collusion are not pleaded, the evidence cannot

be looked into.

6. As rightly found by the trial court, the specific case was that Ext.X1 sale deed was executed by the first respondent impersonating herself as the appellant in favour of second respondent, her husband. The thump impression of Ext.X1 with the admitted thump impressions were got examined by the Police in the criminal case. They were also got examined by the Munsiff when the suit was pending. It was not disputed that respondents were ultimately convicted for the offences under sections 416, 468 and 477 read with section 34 of I.P.C. True, the judgment of the criminal court cannot be the basis for granting a decree in the suit and the judgment could be looked only to find out whether the criminal prosecution ended in conviction or acquittal. The trial court did not rest on the finding of the criminal court. Instead the fingerprint expert was examined as PW2. The reports were marked as Exts.C1 to C2(b). The evidence of PW2 with the reports conclusively prove

that the thump impression seen in Ext.X1 is not that of the appellant but that of first respondent. Even if it could be said that the science of identification the handwriting has not reached the exactitude, that is not the case with the thump impression. Thump impressions of two human beings will not tally. The evidence conclusively establish that the thump impression seen in Ext.X1 is not only that of the appellant but that of the first respondent. In the light of this evidence, the first appellate court should not have interfered with the findings of the trial court that Ext.X1 is the result of impersonation practised by the first respondent. When it is proved that first respondent impersonated appellant and executed Ext.A1, first appellate court should not have interfered with the decree granted by the trial court.

The Second Appeal is therefore allowed. The decree and judgment passed by the first appellate court is set aside and that of the trial court is

restored.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.833 /93

JUDGMENT

18TH JUNE,2007